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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. OMAR GUZMAN, Defendant and Appellant.	H027421 (Santa Clara County Super. Ct. No. EE223520)

Defendant was originally charged with two felonies, assault with a deadly weapon and battery with serious bodily injury, both committed for the benefit of a criminal street gang. (Pen. Code §§ 245, subd. (a)(1), 242-243, subd. (d), 186.22, subd. (b)(1).)[1] Following a mistrial, defendant entered into a negotiated disposition. The information was amended to add a third felony count, simple assault committed for the benefit of a criminal street gang. (§§ 240-241, 186.22, subd. (d).) In exchange for his plea of no contest to this third count, counts 1 and 2 were dismissed and he was promised a probationary sentence with a six-month jail term.

On the day set for sentencing, defendant moved to withdraw his plea on the grounds that he was misled into pleading no contest to a felony and was now convinced count 3 was a misdemeanor. His motion was denied. Imposition of sentence was

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

suspended and defendant was placed on probation for three years on the condition that he serve six months in the county jail. He filed a notice of appeal alleging that he did not "challenge the validity of the plea but rather the classification of the offense as a 'strike' and a 'felony.' " He did not obtain a certificate of probable cause. The Attorney General argues that the failure to obtain a certificate of probable cause renders this appeal inoperable. Defendant did not file a reply brief or otherwise challenge the Attorney General's assertion. Because we view defendant's appellate claim as a challenge to the validity of his plea, we agree with the Attorney General that a certificate of probable cause was required in this case and we will dismiss the appeal.

Statement of Facts

We briefly summarize the facts of the underlying crime as presented in the probation officer's report. On October 22, 2002, a car driven by Jesus Parra was stopped at a red traffic light in Sunnyvale when a car driven by defendant pulled up next to Parra's car and also stopped at the light. Co-defendant Luis Gonzalez, defendant's passenger, got out of the car and threw a steering wheel locking device known as "the Club" through an open window into Parra's car. The Club struck Parra's passenger, Jose Alcazar, on the head, causing a laceration that bled freely. All four men were known to the police as members of rival street gangs.

We summarize in greater detail the facts surrounding defendant's plea of no contest. At the time of the negotiated plea, the prosecutor described the bargain in the following terms: "In regard to Mr. Guzman, an additional Count 3 will be added. Mr. Guzman will be admitting a violation of . . . section 240-241, which is made a felony pursuant to . . . section 186.22(d) for the gang involvement in that crime, and there's a six month top/bottom offer in that." Asked by the court if that was his understanding, defense counsel added: "It is my understanding, Judge, and just for the record so we're clear, I had an in-depth discussion with Mr. Guzman regarding some of the attorneys'

beliefs. This case is a little confusing over the actual effect of 186.22(d), [the prosecutor] charging it to elevate the 240 misdemeanor to a felony. We have all read the *In re Robert L.* case, which is 30 Cal.4th 894, which I explained to my client makes it not so clear as to whether or not it is a felony for any or all purposes, whether or not everything remains a misdemeanor, and it's just a penalty provision. Having said all of that, and having explained all that in much greater detail to Mr. Guzman, he's ready to proceed as outlined."

The court further explained to defendant:

THE COURT: "So what your attorney has said here in court, and I'm sure to you, and we've had discussions in chambers, I met with all three attorneys, the state of the law is in fluctuation at this time, so we don't know which interpretation of this law is going to be correct. I'm going to advise you as though it is a felony and will be a felony and therefore would be a strike. However, the other way of reading this is that it is a misdemeanor and becomes a felony pursuant to the penalty statute of 186.22(d), and therefore would not be a felony for all purposes. It would be a felony for purposes of sentencing only. You're going to have to assume and conduct yourself in a manner that it is a felony and that it is or could be a strike, and what that means, and what you can do and should do, is obey all laws so it will have no penalties. If you obey all laws now, the one difference could come with regard to the advisement that I'm going to give you with regard to possession of any firearms or ammunition, because the statute itself, even the misdemeanor 240-241, it's illegal for you to have possession for the next ten years. If it is considered by the law to remain a felony for all purposes then it is a lifetime ban, and it also would have some consequences with respect to your ability to vote. A convicted felon is not able to vote,[2] so those I think would be the main things of concern to you, and

[2] In fact, a convicted felon may vote so long as he or she is not "imprisoned or on parole for the conviction of a felony." (See Elections Code § 2150, subd. (a)(9); *People v. Ansell* (2001) 25 Cal.4th 868, 873 & fn. 9.)

of course even more importantly is, if it should be considered a strike in the future then that would double penalties and reduce your good time/work time.[3] Do you understand that fluctuation and, you know, certainty, Mr. Guzman?

[DEFENDANT]: "Yes, I do."

After taking co-defendant's plea, the court inquired if defendant's "decision then to plead guilty or no contest and admit this allegation [was] being made freely and voluntarily because under the circumstances this is the way you wish to resolve the matter, Mr. Guzman?" Defendant replied that it was. The court thereupon advised defendant of various consequences of his plea, including that he would not be imprisoned in state prison at the time of sentencing, but that if he violated his probation he could be sentenced to state prison for nine years; that if he went to prison he could be placed on parole for up to four years, and could serve one year for each parole violation; that "as a convicted felon," it was illegal for him to own or possess firearms or ammunition; and that he was pleading guilty to a strike offense. The court added: "[T]his is one of the fuzzy areas in your plea. I'm going to advise you that it is a strike. It may or may not be in the future depending upon how this law is determined and any other new legislation that may come about. So at this time I'm advising you that these are strikes." He was also advised of the requirement that he register pursuant to section 186.33 as a gang member. Finally, the court asked defendant, "as to Count 3 as amended, Mr. Guzman,

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[3] But see *People v. Briceno* (2004) 34 Cal.4th 451. In *Briceno* our Supreme Court held that "section 1192.7 (c)(28) includes within its ambit any felony offense committed for the benefit of a criminal street gang under the section 186.22(b)(1) gang sentence enhancement," but *excluded* misdemeanor offenses committed for the benefit of a criminal street gang and punishable as felonies under section 186.22, subdivision (d) because, "[a]s stated in *People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1448 [citation] (*Arroyas*), a 'misdemeanor, converted to a felony by [section 186.22] subdivision (d) [is not also] subject to the felony enhancement provided in [section 186.22,] subdivision (b)(1).' " (*Id.* at pp. 459, 462.)

how do you plead to the crime of assault in violation of Penal Code Section 240-241, a felony, pursuant to Penal Code Section 186.22(d) . . . ?" Defendant pleaded no contest.

Contentions

Defendant contends, based on *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, that he stands convicted of a misdemeanor only, and therefore should not be subject to all the direct and collateral consequences of a felony plea, such as revocation of his driver's license, a minimum restitution fine in excess of $100, a restriction of his voting rights, a ban on firearm possession and potential for liability under the Three Strikes Law. Defendant maintains that his assertions do not challenge the validity of his plea. He anticipates an attack on the propriety of his appeal on the grounds that he did not lodge a formal objection below "to the felony characterization of the assault charge." He also claims his attorney was incompetent for failing to object, if his failure to object bars review of his claim. The Attorney General argues that appellate review is barred not by his failure to object, but by his failure to obtain a certificate of probable cause. To this claim, defendant makes no reply. Our review of the relevant case law persuades us that the Attorney General is correct.

Discussion

"A defendant who has pleaded guilty or nolo contendere to a charge in the superior court, and who seeks to take an appeal from a judgment of conviction entered thereon, may not obtain review of so-called 'certificate' issues, that is, questions going to the legality of the proceedings, including the validity of his plea, unless he has complied with section 1237.5[4] . . . and the first paragraph of rule 31(d) of the California Rules of

[4] Section 1237.5 provides in relevant part: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written

Court[5] - which require him to file in the superior court a statement of certificate grounds as an intended notice of appeal within 60 days after rendition of judgment, and to obtain from the superior court a certificate of probable cause for the appeal within 20 days after filing of the statement and, hence, within a maximum of 80 days after rendition of judgment." (*People v. Mendez* (1999) 19 Cal.4th 1084, 1088, fns. omitted; see also *In re Chavez* (2003) 30 Cal.4th 643, 651.) In *Mendez*, our Supreme Court concluded that section 1237.5 and former rule 31(d) should be construed strictly, thus resolving a conflict in the courts of appeal between opinions which had applied the section 1237.5

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statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

[5] California Rules of Court, rule 30(a) and (b), which replaced former rule 31(d) provides in relevant part: "**a) Notice of appeal** [¶] To appeal from a judgment or an appealable order of the superior court in a felony case . . . the defendant or the People must file a notice of appeal in that superior court. To appeal after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must also comply with (b). [¶] . . .[¶] **(b) Appeal after plea of guilty or nolo contendere or after admission of probation violation** [¶] (1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court--in addition to the notice of appeal required by (a)--the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. [¶] (2) Within 20 days after the defendant files a statement under (1), the superior court must sign and file either a certificate of probable cause or an order denying the certificate. [¶] (3) If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal "Inoperative," notify the defendant, and send a copy of the marked notice of appeal to the district appellate project. [¶] (4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on: [¶] (A) the denial of a motion to suppress evidence under Penal Code section 1538.5, or [¶] (B) grounds that arose after entry of the plea and do not affect the plea's validity. [¶] (5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1)."

and former rule 31(d) in a strict manner and those which had not. (19 Cal.4th at pp. 1097-1098 & fns. 5 & 6.)

A majority of this court has most often in its published opinions applied the certificate requirement in a strict manner to bar direct appellate review of claims attacking the validity or legality of the plea. (See *People v. Jones* (1995) 33 Cal.App.4th 1087 (Premo, J. dissenting); *People v. Arwood* (1985) 165 Cal.App.3d 167 [denying direct appeal, but treating appeal as petition for writ of habeas corpus]; *People v. Breckenridge* (1992) 5 Cal.App.4th 1096, overruled on another point in *In re Chavez, supra,* 30 Cal.4th at p. 657 & fn. 6.) The critical question is whether the appeal does or does not actually attack the plea. "In determining whether section 1237.5 applies to a challenge of a sentence imposed after a plea of guilty or no contest, courts must look to the substance of the appeal: 'the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.' [Citation.] Hence, the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. [Citation.]" (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.)

Here, defendant does not challenge his probationary sentence or the imposition of a six-month jail term as a condition of probation. Instead, his appeal challenges what he terms "the felony *characterization* of the assault charge" and "request[s] the court declare his *conviction* to be a misdemeanor conviction" because "[t]o use Penal Code section 186.22(d), as in the present case, to substantively transform misdemeanor crimes and make misdemeanor convictions trigger the same ill consequences as felony convictions for any and all purposes is to act without legal authority and jurisdiction." (Italics added.) His ineffective assistance of counsel claim is premised on his attorney's failure to object to the negotiated plea to a felony. Even his challenge to the $200 minimum felony fine is predicated on the claim that his *conviction* is really for a misdemeanor, not a felony.

In our view, a challenge to the conviction *is* a challenge to the legality or validity of the plea. "A defendant suffers a conviction when he or she pleads guilty. [Citations.] A plea of guilty or nolo contendere is a 'conclusive admission of guilt' [citation], and constitutes a conviction ' "within the ordinary as well as the technical meaning of the word, ..." ' [Citations.] By pleading nolo contendere a defendant 'acquire[s] the status . . . of a person convicted of a felony.' [Citation.] Thus, as we understand it, appellant's claim that the conviction is unlawful is necessarily a challenge involving the validity of the plea and an appeal on that basis must comply with the requirements of section 1237.5. That section, as we have noted, expressly encompasses all claims raising 'constitutional, jurisdictional or other grounds going to the legality of the proceedings.' " (*People v. Jones, supra,* 33 Cal.App.4th at pp. 1093-1094.)

A certificate of probable cause was required to make defendant's appeal operable. No certificate was obtained. Defendant's failure to obtain a certificate of probable cause precludes appellate review of the merits of his appeal. (*People v. Mendez, supra,* 19 Cal.4th at pp. 1096-1097.) The appropriate disposition is dismissal. (*Ibid*., *People v. Jones, supra,* 33 Cal.App.4th at p. 1094.)

Conclusion

Although defendant's appeal challenges the legality of his no contest plea to a felony, he has not complied with the requirements of section 1237.5 or California Rule of Court 30(b) by obtaining a certificate of probable cause. Accordingly, his appeal is inoperable.

Disposition

The appeal is dismissed.

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McAdams, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Mihara, J.